# In the Supreme Court of the United States

OCTOBER TERM, 1963

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No. 888

JOHN KASLOW, ETC., PETITIONER

*v.*

PAUL RAND DIXON, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner commenced this action in the district court to enjoin the Federal Trade Commission from conducting an administrative proceeding, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), on the ground that all the issues before the agency had already been resolved in favor of petitioner by a 1957 decision of the Court of Appeals for the Seventh Circuit (*J.C. Martin Corp.* v. *Federal Trade Commission*, 242 F. 2d 530) setting

aside an earlier Commission cease-and-desist order against petitioner based on similar practices. The district court dismissed the action, entering summary judgment against petitioner, and the court of appeals affirmed without opinion.[1]

The administrative proceeding which petitioner sought to enjoin has gone forward and the hearing examiner on November 4, 1963, issued an initial decision which (1) rejected petitioner's contention that the proceeding is barred by the court of appeals decision in the *Martin* case, *supra*, (2) ruled that petitioner had violated the Federal Trade Commission Act by selling merchandise by means of a lottery and a chance or gaming device, and (3) recommended that a cease-and-desist order issue. Petitioner has appealed from that decision to the Commission.

Both courts below correctly refused to enjoin the Commission proceeding. It is well settled, of course, that the courts ordinarily will not enjoin an administrative hearing, even where the claim is that the agency has no jurisdiction. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535. In the present case, where the claim is merely that the proceeding is barred by *res judicata*, a defense which is not jurisdictional, the courts below *a fortiori* properly refused to enjoin the proceeding.

[1] On March 19, 1963, the Chief Justice denied a stay pending a determination of the petition.

See *So. Pac. R.R. Co.* v. *United States*, 168 U.S. 1, 57; *Commissioner* v. *Sunnen*, 333 U.S. 591, 599. The *res judicata* defense was raised in the administrative proceeding and rejected by the hearing examiner. If the Commission enters a cease-and-desist order against petitioner, petitioner may then seek judicial review of that order in the court of appeals, and in such proceeding he will be able to raise all the issues which he here seeks to litigate. See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320.[2]

Furthermore, it appears that the *res judicata* defense is groundless. Cf. *Federal Trade Commission* v. *Raladam Co.*, 316 U.S. 149; *National Labor Relations Board* v. *Thompson Products*, 130 F. 2d 363, 367 (C.A. 6); *Hastings Mfg. Co.* v. *Federal Trade Commission*, 153 F. 2d 253 (C.A. 6), certiorari denied, 328 U.S. 853. The present proceeding involves acts allegedly committed through 1962, whereas the earlier proceeding involved acts during and prior to 1953. Moreover, since the court in the *Martin* case set the Commission's order aside for lack of evidence to prove a lottery (242 F. 2d at 534), that ruling did not bar a proceeding based on sales in later years which involved new or different evidence. Finally, in the current administrative proceedings, the complaint charged petitioner with utilizing a chance or gaming device (as distinguished from a lottery) in

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[2] Petitioner's reliance on *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (C.A. 4) and *Leedom* v. *Kyne*, 358 U.S. 184, is misplaced. Both of those cases recognized that judicial interference in administrative proceedings is improper where, as here, the judicial remedy provided for by statute is adequate.

selling merchandise, a charge not involved in the first proceeding. Indeed, the Seventh Circuit recently recognized this distinction in holding that the *Martin* case (which involved a lottery) is inapplicable to the sale of merchandise through a gaming device. *Gerson* v. *Federal Trade Commission*, 325 F. 2d 93, 94-95.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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